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NO. 94-728

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

In re LAWRENCE B. SMITH,

Petitioner.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, THE HONORABLE JOHN O. NEWMAN, CHIEF CIRCUIT JUDGE, THE HONORABLE RALPH K. WINTER, CIRCUIT JUDGE, THE HONORABLE DENNIS G. JACOBS, CIRCUIT JUDGE; THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE THOMAS J. MCAVOY, CHIEF DISTRICT JUDGE

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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OCTOBER, 1994

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Supreme Court Rule 15.7, Petitioner submits this supplemental brief. We call the Court's attention to the following significant cases which came to Petitioners' attention after his petition for an extraordinary writ was filed: *Roundtree v. United States*, No.93-35792; and *In re: Lawrence B. Smith; Roundtree v. United States*, No. 93-36160, slip op. 14271 (9th Cir. Nov. 22, 1994) (1994 WL 652780) (combined opinion).

Both the *Roundtree* case-in-chief and Rule 11 sanction matter demonstrate the same pattern described in our petition: neither Justice Department counsel, district court, nor appeals court, deal individually with the carefully separated counts in the complaint (attached hereto as an exhibit). Moreover, the Ninth Circuit declined to remand to the district court to rectify those deficiencies. "The unique

history of specious legislation [sic!] fostered by Smith indicates that a just application of the rules to this case militates . . . [against remand.]" *Roundtree,* Slip Op. at 14281.

Is it legal heresy to challenge an enforcement system of administrative justice that can deprive a person of his livelihood when no language is contained the United States Code, Code of Federal Regulations, Federal Register, or legislative history, that even hints at a connection between safety violations and suspension or revocation of an airman's license as a penalty? Is it responsible judicial conduct for courts to ignore this?

Preliminarily, it should be noted that in order to affirm district court dismissal for lack of subject matter jurisdiction the appeals court engaged in a sort of Fed.R.-Civ.P. 12(b)(6) dismissal, or a form of Rule 56 summary judgment. This, without any

factual record of affidavits or discovery to support it and ignoring what each individual count asserts. This violated the principle that the allegations of the complaint must taken as true. "[T]he decision we review was entered on a motion to dismiss. We therefore 'accept all of the factual allegations in [Gaubert's] complaint as true' and ask whether the allegations state a claim sufficient to survive a motion to dismiss. [citing case]."*U.S. v. Gaubert*, ___ U.S. ___, 111 S.Ct. 1267, 1276 (1991). "What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of the complaint's factual allegation. District court judges looking to dismiss claims on such ground must look elsewhere for legal support. "*Neitzke v. Williams*, 490 U.S. 319, 327 (1989).

The Ninth Circuit's analysis violated the principle that "A federal district court is under a mandatory duty to dismiss

a suit over which it has no jurisdiction. [Citing cases.] When a court must dismiss a case for lack of jurisdiction, the court should not adjudicate the merits of the claim."*Stanley v. Central Intelligence Agency*, 639 F.2d 1146, 1157 (5th Cir. 1981).

Roundtree v. United States, is in direct conflict with *Mace v. Skinner*, 34 F.3rd 854, 857 (9th Cir. 1994). *Mace* is a *Bivens* action involving many of the same issues. Although *Roundtree* cites that case (*"cf."*), Slip Op. at 14276, the decision provides no analysis. *Mace* reversed and remanded the case to the district court because there was subject matter jurisdiction, in spite of 49 U.S.C. app. § 1486 (1993 supp.). In *Roundtree*, the panel takes the opposite view. The two cannot be reconciled.

A few examples underscore the critical need, if justice is to be done for Petitioner, of dealing with individual

counts. "Here Roundtree seeks to attack the whole underlying basis of the FAA's authority to issue and enforce rules and regulations which affect certificates." *Roundtree*, Slip op. at 14278. The Complaint ¶ 27, a-27, does state that "The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. . ." If this is not true, all the government and courts need do is cite the statute that authorizes suspension or revocation as a penalty. They do not, because they cannot.

The problem is again illustrated by the above language about authority "to issue and enforce rules and regulations." Had government and courts dealt with individual counts, the plaintiff could have pointed out that the majority of counts do not challenge but assume authority to promulgate a given rule. The problem is that Federal Aviation Administration (FAA) offi-

cials have failed to issue any rules regarding license penalties. In some instances they are charged with violating the agency's own policies ("rules"):

Paragraph 20, a-16 — "Violation of agency emergency guidelines." Paragraph 21, a-18 — "No emergency rule with criteria." Paragraph 22, a-19[1] — "No 'compliance disposition' rule." Paragraph 25, a-24 — "No Part 135 fraudulent record-entry rule." Paragraph 28, a-29 — "No license-penalty rule." All of these assume the FAA has authority to adopt such rule. But how can it not be negligence for an agency to implement a host of policies in order to

---

1. See Beins v. United States, 695 F.2d 591 (D.C. Cir. 1982); *see also Harr v. United States*, 705 F.2d 500, 504 (1983) ("We believe the government's argument misses the point that the FAA can be liable for negligent actions of its medical certification staff, and that Harr indeed alleged such negligence.").

suspend or revoke certificates as a penalty but fail to tell the public about them in its own rules, especially when no statute exists that hints at such power?

The *Roundtree* opinion does contain a single exception: a footnote, Slip Op. at 14279 n. 2, adverts to the defamation charge, Complaint ¶ 29, a-30, involving the harm done by agency officials issuing a press release and making oral statements that branded Mr. Roundtree a criminal before any trial. It illustrates the problem, however. Had counsel for plaintiff been able to address this issue below, this case would have been cited: *Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir. 1992), and 4 F.3d 369 (5th Cir. 1993). There an insurance executive made a plea bargain with the IRS that included a press release so constructed it would not reveal who he was. Involved was less than $3,500. In violation of the agreement, IRS issued a press re-

lease that allowed his company to find out about the matter. He was fired. The district court held that it had Federal Tort Claims Act (FTCA) jurisdiction (the complaint started as a *Bivens* action and was later amended to include the FTCA.) It awarded Mr. Johnson some $11 million dollars. FTCA jurisdiction and the judgment (with some modification) were upheld

How can it be said there is no reasonable argument for the defamation claim? If other technical legal language would have been more appropriate, rather than the term "defamation," Mr. Roundtree should have had an opportunity to amend his complaint accordingly.

A further example: Citing *Go Leasing, Inc. v. National Transp. Safety Bd.* 800 F.2d 1514 (9th Cir. 1986), the *Roundtree* court stated: "In that case, we expressly held that the FAA has the discretionary authority both to select sanctions and to

impose sanctions upon certificate holders. *Id.* at 1518-20." *Roundtree,* Slip Op. at 14279. Neither *Go Leasing* nor any other case has ever been developed based upon a record of affidavits or discovery that explains how the FAA enforcement program works. (The government is shielded by the very fact there are no rules!) No case has ever quoted 49 U.S.C. app. § 1471(1) (1993 supp.) which reads "Any person who violates . . . any provision of [this Act] or . . . any rule, regulation or order issued thereunder . . . shall be subject to a civil penalty of not to exceed $1,000 for each such violation . . ." And explained why that explicit language does not mean what it says. 49 U.S.C. app. § 1473(a) (1993 supp.) reads: "The trial of any offense under this chapter shall be in the district in which such offense is committed . . ." Section 1473(b)(1) provides that "either party may demand trial by jury of any issue

of fact if the value in controversy exceeds $20 . . ." No case has ever recognized that in choosing between a civil penalty and a license penalty for the same safety violation FAA officials determine not only whether the airman gets a judicial or administrative trial, determine his punishment even before he is charged, and determine whether or not he will ever have an opportunity to "demand" jury trial. If any precedent supports such a situation, justice requires the government and courts to advise petitioner of it.

Respectfully submitted,

_____

Lawrence B. Smith
Petitioner Pro Se

Filed Oct. 23, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

J92-029 CIV

DANE T. ROUNDTREE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

CIVIL COMPLAINT UNDER THE
FEDERAL TORT CLAIMS ACT

Plaintiff Dane T. Roundtree complaints and alleges:

1. This action arises under the Federal Tort Claims Act, Sections 2671 through 2680 of Title 28 of the United States Code (28 U.S.C. §§ 2671-2680). This Court is vested with jurisdiction pursuant to Section 1346-(b) of Title 28 of the United States Code (28 U.S.C. § 1346(b)).

2. Plaintiff Dane T. Roundtree is a resident of Petersburg, Alaska.

3. On 13 November 1989 the Federal Aviation

Administration issued an Emergency Order that revoked the Part 135 (14 CFR pt 135) air-taxi operating certificate of Alaska Island Air, Inc. (AIA), of Petersburg, Alaska. At the same time it issued a Notice of Proposed Certificate Action proposing to revoke plaintiff Roundtree's Airline Transport Pilot (ATP) certificate. Revocation of AIA's operating certificate and the proposed revocation of Roundtree's pilot license were based on a virtually identical set of violations of certain Federal Aviation Regulations (FARs) allegedly committed by Roundtree.

4. On 28 October 1991 an Order of Suspension, detailing later charges from events alleged to have occurred on 12 February 1991 (largely involving failure to tie down a piece of cargo), was issued against plaintiff. The earlier revocation case against him, although having been left in limbo for two years, was revived and sever-

al of the charges combined with the new case. The 1989 charges of falsification of records, however, were dropped--they had been soundly defeated in the AIA case--and a total suspension penalty of 150 days for the combined cases was ordered 28 October 1991.

5. The revocation order for AIA, after reciting the alleged violations, provided:

> By reason of the foregoing, the Administrator has determined that you do not possess the care, judgment, and responsibility required to hold such certificate and that safety in air commerce and the public interest require the revocation of your air carrier operating certificate.
>
> Further, the Administrator has determined that an emergency exists and that safety in air commerce and the public interest require the immediate effectiveness of this Order.

The November 1989 notice regarding revocation of Roundtree's pilot license contained similar language. Because it was not an "order" but only a notice of *proposed* certificate action it inherently could not be issued on an emergency basis, thus leav-

ing plaintiff with the automatic stay provided by 49 U.S.C. § 1429(a) of the effective date of any suspension or revocation order that would follow.

6. After detailing the remaining 1989 charges and those from the alleged February 1991 incident, the combined order against Roundtree stated:

> By reason of the foregoing, the Administrator has determined that safety in air commerce or air transportation and the public interest require the suspension of your Airline Transport Pilot Certificate.
>
> NOW, THEREFOR, IT IS ORDERED, pursuant to the authority vested in the Administrator by Section 609 of the Federal Aviation Act of 1958, as amended, that:
>
> (1) Any airman certificate now held by you, including Airline Transport Certificate No. 574328098, be and hereby is suspended [for 150 days]. . . .

7. All orders were issued in the name of the FAA Administrator. The emergency revocation order for AIA was signed by John C. Curry, FAA Assistant Chief Counsel for the Alaskan Region; the concurrent notice proposing revocation of plaintiff was sign-

ed in Curry's name by his assistant Donald E. Borey; the much later order combining the two cases against plaintiff personally were signed in Curry's name by staff lawyer Howard L. Martin Jr.

8. All orders were issued under the claimed authority of sections 609 of the Federal Aviation Act of 1958, as amended ("FA Act"), 49 U.S.C. §§ 1429(a); and under a delegation of authority, contained in 14 CFR § 13.19, from the Administrator to the Assistant Chief Counsels for various FAA administrative regions, and certain others, to issue suspension and revocation orders on his behalf. Section 1005(a), 49 U.S.C. § 1485(a) was cited as additional authority for the emergency revocation of AIA.

9. The case against AIA went to trial ear ly on Thursday 14 December 1989 before a National Transportation Safety Board administrative law judge ("ALJ") and ended late in the evening of the next day, Friday

15 December. FAA lawyers Donald E. Borey and Delinda L. Wall served as FAA trial counsel. In his Initial Decision the ALJ ruled there were no grounds for revocation and held for AIA. The next day Curry returned AIA's operating certificate and notified NTSB General Counsel John M. Stuhldreher that the FAA was dropping the emergency claim and would no longer seek revocation. Later, however, Curry appealed certain of the charges to the full five-member NTSB Board asking it to suspend AIA's operating certificate for 120 days. In the meantime AIA--the corporate shell with its certificate authorizing scheduled service--was sold. (The NTSB ultimately upheld a suspension of 150 days for AIA's air-taxi certificate, although the company had long had new owners.) When the combined case against plaintiff Roundtree finally came to hearing, it was settled with a 30-day suspension on the basis of a couple of

minor charges.

10. Plaintiff Dane Roundtree at the time of the emergency revocation was owner of Alaska Island Air, Inc., buying it from his father Lloyd Roundtree, who in 1967 had essentially started the company and built it into a significant multi-plane scheduled and on-demand operation. In 1989, by now reduced in size to a two-plane operation because of competition fostered by deregulation, the company was sound financially. After the shutdown, which occasioned the loss of several regular customers and a severe depletion of its cash reserves, the company's financial situation deteriorated and plaintiff Roundtree was forced to sell the corporation, along with certain assets, principal one of which was its operating certificate and transferable authority to fly scheduled air-taxi service and carry the United States mail, authority it had held for more than twenty years.

11. Revocation of AIA's operating certificate, and Roundtree's pilot license, and use of the Administrator's emergency power against AIA causing its immediate shutdown, were rationalized because of charges that Roundtree had cooked the company books. Among others: the number of training hours given two new pilot-applicants, and that he "made or caused to be made fraudulent or intentionally false entries in a logbook, record, or report" required to be kept by an operator.

12. Concurrently with issuing and serving the emergency revocation order on Alaska Island Air, Paul Stuecke, FAA press spokesman for the Alaskan Region, told the press, among other things, that AIA, meaning Dane Roundtree, who at the time was the manager and only pilot of the operation, "intentionally made false entries in records to show compliance with federal regulations." Additionally, "The revocation

is automatic because of fraudulent entries," and referring to other carriers recently grounded by the Alaskan Region, he told the media that all nine were cited for the same "significant" item, "fraudulent" paperwork. These defamatory charges, as well as others, made to the media by means of a press release and orally, were completely untrue; neither plaintiff Roundtree nor AIA had been convicted of any such offenses at the time they were so made; and, subsequently AIA and Roundtree were totally exonerated.

13. At times relevant to the claims made herein: Samuel K. Skinner, as Secretary, Department of Transportation, had overall responsibility for the various modalities of that Department, including the Federal Aviation Administration; James B. Busey IV, as FAA Administrator, was directly responsible by law and delegation of authority from Secretary Skinner, for all agency

actions.

14. At times relevant to the claims made herein, the following were directly responsible for supervising, implementing and conducting the FAA's regulatory enforcement program at both DOT and FAA headquarters in Washington, D.C.: C. Dean McGrath, Jr., Acting DOT General Counsel; Neil R. Eisner, DOT Assistant General Counsel for Regulations and Enforcement; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; John H. Cassady, FAA Deputy Chief Counsel; Donald P. Byrne, FAA Assistant Chief Counsel for Regulations and Enforcement; Peter J. Lynch, FAA lawyer, head of the FAA Chief Counsel Office Enforcement Proceedings Branch.

15. At times relevant to the claims made herein, the following were directly responsible for either the initiation, supervision or conduct of the various enforcement actions taken against Alaska

Island Air, Inc. and plaintiff Roundtree, and the press releases: John C. Curry, Assistant Chief Counsel, FAA Alaskan Region; Donald E. Borey, Deputy Assistant Chief Counsel, FAA Alaskan Region; DeLinda L. Wall, former staff lawyer, FAA Alaskan Region; Howard L. Martin Jr., staff lawyer, FAA Alaskan Region; Kenneth P. Quinn, FAA Chief Counsel; Gregory S. Walden, former FAA Chief Counsel; James E. McCoy, FAA inspector; John R. Hallinan, FAA inspector; C. Jonathan Tamplin, manager FAA Flight Standards District Office, Juneau, Alaska; Thomas S. Westall, former head of the FAA Alaskan Region Flight Standards Division; Frank L. Cunningham, former Regional Director, FAA Alaskan Region; Paul Stuecke, former press officer and now a management official with the FAA Alaskan Region headquarters.

16. At times relevant to the claims made herein, the following had overall

responsibility for legal affairs of the National Transportation Safety Board and its handling of FAA certificate actions appealed to the Board: Daniel D. Campbell, NTSB General Counsel; John M. Stuhldreher, former NTSB General Counsel.

17. FAA officials, after investigation and a determination to initiate enforcement action against a suspected violator has been made, unless only low-level administrative action is taken, choose between initiating civil penalty action or punitive certificate action. This occurs even before the alleged violator is given notice he is being charged. The former, with the recent exception to be noted, carries with it the right to "demand" jury trial, with the only possible penalty a money fine; the latter affords trial in a one-man administrative hearing with right of appeal to the full five-member National Transportation Safety Board; the only possible penalty is license

suspension or revocation. The United States District Judge has no authority to change the money-fine to a license suspension, no matter how heinous the offense; the Board cannot change suspension or revocation to a money fine, no matter how severe and disproportionate the impact might be, for instance, on a professional pilot who could lose months of wages, indeed, his job, or an entire business shut down. Ironically, an unlicensed person, who commits the same violation, because there is no certificate to proceed against, is guaranteed his right to be tried in United States District Court with the right to "demand" trial by jury of any fact, as has been provided in law since 1926 and, at the least, pay only a money fine.

18. The FAA Administrator, through subordinates, pursuant to the Federal Aviation Act of 1958, as amended (FA Act), sections 609 and 1005(a), 49 U.S.C. §§ 1429(a) & 1485-

(a), oftimes declares that an emergency exists requiring the immediate effectiveness of a suspension or revocation order (usually revocation). Revocations for a true lack of qualifications occur for medical reasons or, infrequently, when a pilot has had an accident and then refuses to take, or flunks, a flight test. Almost always, emergency revocations are based either on the perceived seriousness of a single violation, like flying under the influence or, in the case of an operator, on a series of alleged violations which usually have occurred over a period of time but are discovered in a narrow time-frame during inspection of company records. Although some are often one, two or three years old, these are lumped together in a single order and revocation justified because the violations demonstrate that the pilot, mechanic or operator lacks the "care, judgment, and responsibility"

required by the FAA of any certificate holder. In other words, maintaining such a standard is a qualification of holding the certificate and a "rule" of the agency. Within both FAA and NTSB it is also known as the "Compliance Disposition" rule. The emergency power is used on grounds the continued exercise of the privileges of the particular certificate by its holder constitutes an immediate threat to air safety and the public.

19. At the above mentioned times and places, and at others unknown, defendant, through its agents, servants and employees, was negligent in the training and supervision of the officials specifically named herein, and others unknown. This negligence allowed DOT, FAA, and NTSB officials in turn to negligently implement and apply to plaintiff Dane T. Roundtree and his company Alaska Island Air, Inc., or neglect to follow: (1) DOT-FAA standards, rules and

policies; (2) provisions of the FA Act; (3) laws governing authority of the NTSB over FAA certificate orders; (4) the Administrative Procedure Act; (4) Constitution of the United States. All of the negligence asserted herein occurred during and within the conduct of the business of the United States government and within the course and/or scope of employment of its agents, servants and employees. Such negligence was the proximate cause of the events and damages which occurred to Dane T. Roundtree and Alaska Island Air, Inc., which were as follows:

20. **Violation of agency emergency guidelines** -- The agents, servants and employees of the defendant carelessly, recklessly and negligently applied the FAA guidelines or "rule" on use of the emergency power against the operating certificate of Alaska Island Air, Inc. There was no rational basis for its use. The agency enforcement

manual provides:

> A. Emergency suspension or revocation of a certificate should be used only as an emergency safety measure and to provide immediate protection to the public. Therefore, emergency actions should be taken as soon as possible after the date of the incident. Moreover, the longer the interval between the date of the incident and the date of the action, the more difficult it will be for the FAA to establish that an emergency exists.
>
> B. An emergency suspension or revocation should never be used for punitive reasons. When receiving a recommendation for emergency action, legal counsel should ensure that there is sufficient evidence of an emergency requiring immediate effectiveness of an order of suspension or revocation . . .

The charges against the company had nothing to do with whether Dane Roundtree or his aircraft were safe to fly with. After twenty-three years without harm to any passenger, or crashing any aircraft, when the company was operating up to six aircraft, and given plaintiff's then 15,000-hours-plus of flying time (now 18,000), there was absolutely no basis to conclude there was any threat to air safety or the public, much less, an immediate threat.

Moreover, the emergency power was in fact used as summary punishment for the perciev-ed fraudulent recordkeeping the Alaskan FAA officials felt Roundtree guilty of. Their violation of the agency's own guidelines violated plaintiff's right to have the agency follow its own rules.

21. **No emergency rule with criteria** -- Although such a rule did exist with the Civil Aeronautics Administration (CAA), from which the original Federal Aviation Agency was transmogrified in 1958, the FAA Administrator has failed to promulgate a rule explaining his emergency power, especially one which would contain as a guide for both agency officials and the public the standards and criteria by which that power is to be employed. In fact, however, the Administrator has established, at least in part, such criteria, those which are set forth in the preceding para-graph, and which are basically those set

forth in the old CAA rule. To understate the matter by several magnitudes, the emergency power has a "substantial" impact on the public. The failure to promulgate FAA emergency standards and criteria through the public notice and comment requirements of the Administrative Procedure Act denied plaintiff his right, as an "interested person," to participate in such rulemaking and have official notice of those criteria. This failure was due to the careless, reckless and negligent interpretation and application by defendant's agents, servants and employees of the Administrative Procedure Act, 5 U.S.C. § 553. Had there been publicly developed criteria the standards of the FAA might not have been so easily violated when used against AIA.

22. **No "compliance disposition" rule** -- In rare instances, revocation is based on an actual lack of qualifications, such as, demonstrated lack of skill as pilot or

mechanic by failure to pass a flight or written test, or refusal to take such when there is a reasonable basis for such a request by FAA officials. By far, most revocations, especially of pilots and air-taxi operators, are based on the claim that the certificate holder has committed either one or two very serious safety violations, like flying under the influence, or a series of alleged violations. In the case of an operator, these are usually turned up by an indepth inspection of company records and interviews of employees, past and present. Based on such a list of unproven charges, FAA officials assert that on their account the operator lacks the "care, judgment, and responsibility" required of a certificate holder, and that failure to maintain such a standard indicates a lack of qualifications to hold the certificate. On its face this is, as noted, a "rule"--known as the "Compliance Disposition" rule.

It is the linchpin justifying revocation and the use of the emergency power; it has a substantial impact on certificate holders. Although there once was an FAA project to draft and promulgate such a rule, it has never been lawfully promulgated. The failure to promulgate such a rule through the public notice and comment requirements of the Administrative Procedure Act, or simply place it in the *Code of Federal Regulations* (CFR), denied plaintiff and AIA their right, as an "interested persons," to participate in such rulemaking, and the failure, at minimum, to publish it in the *Federal Register* or *Code of Federal Regulations* violated their right to have official notice of fundamental agency policies. This failure has been due to the careless, and reckless negligence of defendant's agents, servants and employees in interpreting and applying the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1) and 553.

23. **No TRO type hearing for emergencies** -- It is a fundamental constitutional requirement that any person, before the government deprive him of life, liberty or property, be given adequate notice to prepare for and the right to participate in a prompt hearing; or, if action must be taken on an immediate basis without prior notice, such as, might occur with a judicial temporary restraining order (TRO), a hearing be held quickly as possible, always within ten days. The emergency power granted the Administrator in FA Act sections 609(a) and 1005(a), 49 U.S.C. §§ 1429(a) & 1485(a), is unconstitutional on its face: it is tantamount to an executive-branch TRO but provides for no hearing either before or immediately after the issuance of an emergency order of suspension or revocation, the purpose of which would be to determine whether or not a true emergency exists, or whether FAA officials are abus-

ing the power by using it as punishment, a use contrary to agency policy. DOT-FAA officials are well aware that the NTSB takes the position it has no authority to determine if a true emergency exists, or the power to do anything about it if they found that it did not. Yet FAA officials have full authority to provide such a hearing, but choose not to use it. Pursuant to the FA Act, section 1007, 49 U.S.C. § 1487, FAA officials have a Congressional mandate which specifically authorizes them to apply to a United States District Court for injunctive relief to stop any threat to air safety because of safety violations. This would have provided the due process constitutional protections afforded by the Federal Rules of Civil Procedure, in particular Rule 65(b). The emergency shutdown of Alaska Island Air, without an immediate judicial hearing on whether there was a true "emergency," violated plaintiff's

right to due process. This was the proximate result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the U.S. Constitution.

24. **Fraud charges without foundation** -- The charges that plaintiff Dane Roundtree made fraudulent record entries were totally without foundation and the result of the careless, reckless and negligent investigation made by defendant's employees James E. McCoy and John R. Hallinan. That they were carried forward through and reviewed by several levels of the Alaskan Region bureaucracy and then charged and tried before the NTSB was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees.

25. **No Part 135 fraudulent record-entry rule** -- Both the emergency order of revocation against AIA and the proposed revocation of plaintiff's ATP charged that he had

"made or caused to be made fraudulent or intentionally false entries in a logbook, record, or report" required to be kept by an operator. Rules governing record entries required to be made and kept by an air-taxi operator are contained in 14 CFR pt 135. Part 135 contains no rule prohibiting "fraudulent" entries, nor do the FARs contain any general rule to that effect. Certain other FAR Parts do contain such a rule but by their own terms are limited to the particular activities covered by that Part. Charging AIA and plaintiff with an offense covered by no regulation was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the agency's own rules, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

26. **License penalties created by the bureaucracy** -- The use of suspensions and

revocations of pilot, mechanic or operating certificates by the FAA as a penalty or sanction for the violation of safety regulations is contained in no statute, no rule in the Code of Federal Regulations, nor in any published interpretation in the Federal Register. Only Congress may constitutionally create penalties, sanctions, or benefits, that is, it may not delegate its *Article I, Section I*, legislative authority to any other branch of the government. This constitutional principle is codified in the Administrative Procedure Act, 5 U.S.C. § 558. The use of certificate suspensions and revocations as penalties is now and always has been, since the federal government first initiated regulation of aviation through the Air Commerce Act of 1926, a creation of the executive branch, not Congress. And this in the face of plain language that states in 49 U.S.C. § 1471 that "Any persn who violates any rule, regula-

tion or order shall be subject to a civil penalty . . ." The imposition of certificate penalties on Alaska Island Air, Inc. and plaintiff Dane Roundtree was due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Regulations, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

27. Money fines, judicial trial and right to demand jury --

(a) The only form of penalty ever authorized by Congress for violations of air-safety rules is the civil-money fine. 49 U.S.C. § 1471. FAA use of the punitive certificate action procedure denied plaintiff and his company, Alaska Island Air, Inc., their statutory right to try to effect a compromise settlement on any legitimate violation and/or pay a money fine for any violations of which they were found

guilty after judicial trial.

(b) No statute authorizes trial of air-safety violations before the National Transportation Safety Board. At all times relevant to the issues herein, the only judicial forum authorized in the Federal Aviation Act of 1958, originating in 1926, seminal year of federal regulation of aviation, and continuing to the present, was United States District Court. There was no lawful right try the safety violation charges against AIA or plaintiff Roundtree before the NTSB, or lawful right on the part of the NTSB to accept such cases when the law, 49 U.S.C. § 1473, provides that "any offense" shall be tried in federal district court.

(c) In addition, since 1926 "any" person who violates "any" air-safety rule, regulation or order has had the absolute right to "demand" trial by jury of any issue of fact, if the value in controversy exceeds

$20. 49 U.S.C. §§ 1471 & 1473. Use of certificate action against AIA and Roundtree, individually, for alleged safety violations denied them their statutory right to pay a money fine, have trial in federal district court, with right to demand a jury. These actions were due to the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Federal Aviation Act of 1958.

28. **No license-penalty rule** -- The Federal Aviation Administration has never promulgated a general rule that warns pilot, mechanic or operator that his license is at risk for the violation of any safety rule; nor a rule which advises that the Administrator claims the power to decide in his absolute discretion to have such charges tried administratively before the NTSB, incurring suspension or revocation, rather than in United States District

Court with the only penalty a money fine. The failure to put such a rule in the Federal Aviation Regulations and cause it to be published in the *Code of Federal Regulations* denied plaintiff and AIA the right have notice of such an important and critical DOT-FAA policy which can so drastically affect the property rights that an FAA certificate represents. That failure was the result of the careless, reckless and negligent conduct of defendant's agents, servants and employees in interpreting and applying the Administrative Procedure Act, the Federal Aviation Act of 1958, as amended, and the U.S. Constitution.

29. **Defamatory press release** -- The making available of a press release and oral comments by FAA officials which told the public plainly that plaintiff and his company Alaska Island Air, Inc. were guilty of acts that constituted federal crimes, even

though they had not yet been tried and found guilty in any forum, violated their right not to be defamed by their government. This occurred because of the careless, reckless and negligent conduct of defendant's agents, servants and employees.

30. The events and actions described herein would not have occurred *but for* the following: negligent supervision and training by Secretaries of Transportation, Administrators of the Federal Aviation Administration, and their general and chief counsels, and other officials, of those DOT, FAA and NTSB employees engaged in rulemaking and regulatory enforcement activities. Nor would they have happened *but for* the negligent and reckless application of the Federal Aviation Act, the laws authorizing NTSB review of FAA certificate orders, the Administrative Procedure Act, United States Constitution, and FAA rules and policies.

31. Under date of 17 September, 1991,

plaintiff Dane T.Roundtree submitted a claim based on the allegations herein in the amount of $8,000,000.00 to the Federal Aviation Administration. Acknowledging its receipt as of 18 September 1991, under date of 6 May 1992, via certified mail, his claim was rejected by the Federal Aviation Administration.

32. As a direct and proximate result of the foregoing acts and omissions on the part of defendant United States of America's agents, servants and employees, their carelessness and negligence, plaintiff Dane T. Roundtree has suffered, and will in the future continue to suffer:

(a) Economic loss:

i) Destruction of his company, Alaska Island Air, Inc.;

ii) Loss of income, past, present and future;

iii) Costs incurred in defending the enforcement actions against both Alaska

Island Air, Inc. and himself;

iv) Damage to his reputation as pilot and manager of an air carrier which has and will harm his career in aviation reducing his future income therefrom;

(b) Personal injury by way of mental distress.

WHEREFORE, plaintiffs pray for judgment against the defendant United States of America as follows:

I. For compensatory damages, the sum of Five Million Dollars ($5,000,000.00).

II. For personal injury by way of mental distress, the sum of Three Million Dollars ($3,000,000.00).

III. For costs of suit and such attorney fees as are allowed by law.

IV. For such other and further relief as the Court may deem just and equitable.

Respectfully submitted,

Lawrence B. Smith
Attorney for Plaintiff